S.C. 85914

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI
Plaintiff/Respondent

v.

WILLIAM DUNN,
Defendant/Appellant

Appealed from the Circuit Court
of Andrew County, Missouri
The Honorable Michael J. Ordnung, Judge,
Circuit Court No. 03-CR-72815

APPELLANT'S REPLY BRIEF

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I. The trial court erred in finding Mr. Dunn guilty and in not granting dismissal or judgment notwithstanding the verdict because RSMo § 304.050(4) violates Mr. Dunn's constitutional rights to due process under the U.S. and Missouri Constitutions by being so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application," in that the pertinent language is a run–on sentence that appears to apply only to "highways" consisting of four or more lanes of traffic, the words "plainly visible" do not provide sufficient guidance so as to avoid arbitrary and discriminatory application, a person of ordinary intelligence must guess as to whether a 300 or 500-foot distance applies and the distances are impossible to determine except in retrospect.

1. Does The Statute Apply Only To Four-Lane Highways?

A. "Dictionary" definitions do not cure the statute's ambiguity.

The State attempts to explain away the vague statutory language by simply ignoring all of the run-on sentence until the portion of the statute which the State believes is directly at issue. But a court is required to consider and give meaning to all of the terms used in a statute. *State ex rel. Nixon v. Estes,* 108 S.W. 3d 795, 798 (Mo. App. W.D. 2003). The relevant sentence of the statute begins by referencing a "highway consisting of four or more lanes of traffic." A person of common and ordinary intelligence is left to guess, therefore, whether, when the statue later refers to "highways," the statute means only four-lane highways.

The State's citation to the "dictionary definition" of "highway" does absolutely nothing to demonstrate the language is not confusing. Moreover, as demonstrated in Appellant's Brief at pages 27-30, even principles of statutory construction *(ejusdem generis)* require that the term "highway" be interpreted to mean "four-lane highway," because it is preceded by that term. If the principals of statutory construction require such an interpretation, how can a person of ordinary intelligence be expected to interpret it otherwise?

The State next claims that Defendant "admitted" at trial that Route D was a highway. First, this is untrue, as Defendant's counsel only made passing reference to "Highway D" at page 75 of the transcript and at page 91 the State is asking questions regarding "the highway." Neither of these constitute an "admission."

Moreover, it is not what Defendant understood at trial that is at issue, but whether he could reasonably anticipate at the time he was driving that he had violated the statute.

Next, the State apparently confuses its lack of evidence with the issue here, arguing that courts "may take judicial notice of official State highway maps." This, of course, does not clear up the vagueness of the statute. Moreover, as discussed further below, the record does not reveal the court being asked to take judicial notice or, in fact, taking judicial notice that Route D is a "highway," much less a four-lane highway.

Next, the State argues that Defendant's actions "belie his protestations" that he was unclear about the term "highway." Once again, however, the fact that Defendant measured the distance involved after the accident does absolutely nothing to demonstrate that the statute is not vague. The same can be said of the State's argument that Defendant's testimony as to Laidlaw policy somehow demonstrates his knowledge of the statue's meaning prior to the incident at issue. The issue here is whether or not the statue is vague, as judged by a person of ordinary intelligence prior to being charged with an offense, not what Defendant's actions were after the incident.

2. The "plainly visible" language is also vague.

On this issue, the State again confuses the issue, focusing on the evidence rather than whether the statute is unconstitutionally vague. It then argues that the "rules illucidated" in *State v. Duggar,* 806 S.W. 2d 407, 408 (Mo. Banc 1991) and *Boone County Court vs. State of Missouri,* 631 S.W. 2d 321, 324 (Mo. Banc 1982), demonstrate that the language "plainly visible" provides "a sufficiently specific constitutional prohibition." Neither of those cases, however, contributes at all to the State's argument, as neither case interprets language even similar to the "plainly visible" language at issue here. In *Duggar,* for example, the issue was whether the term "minor," without an explicit definition, rendered a statute unconstitutionally vague. The term "minor" has a well-known, common legal definition, unlike the term "plainly visible." And in *Boone County*, the court was examining a constitutional provision, which the court recognized to be more broadly construed than statutes. The case did not deal with a criminal statute, with notice to a criminal defendant, or with the level of run-on, vague and confusing language utilized in the statute at issue here.

Instead of addressing Defendant's discussion of the rules of statutory construction that are directly applicable here, the State simply ignores this discussion, because the rules of statutory construction simply do not support the State's position. It also attempts to ignore the very relevant questions set forth in

Defendant's Brief posed by the statute, each of which directly addresses whether "men of common intelligence must necessarily guess" at the statutes meaning, which is precisely the relevant inquiry here. The State does not respond, because it does not know how, for example, a bus driver is to view the bus from another's perspective or how a driver is to judge or measure a distance of 300 feet while in motion.

Likewise, the State simply ignores the fact that a statute is subject to stricter scrutiny if it makes conduct unlawful only because it is prohibited, and not a wrong in and of itself, or if there is no intent requirement, both of which are circumstances present here.

The State has, therefore, completely and utterly failed to counter the fact that the run-on, ambiguous sentence at issue here is unconstitutionally vague.

II. The trial court erred in finding Defendant guilty because no violation of the statute occurred here, in that the statute applies only to "highways" and, in particular, to "four- lane highways," and the State did not demonstrate Route D was a highway, much less that it has four lanes.

A. The State Offered Absolutely No Evidence On This Element.

The only evidence the State can point to at trial to show it proved this

element of the offense is the following exchange between the prosecutor and Trooper Tourney:

Q: Are you generally familiar with Route D in Andrew County, Missouri?

A: Yes.

Q: Can you describe it briefly for the court?

A: It's a two-lane state lettered road. Very hilly. Just a back road.

Q: Does it run in a north-south direction?

A: Yes, it does.

Q: A blacktop highway?

A: Blacktop. (TR. 19)

Obviously, Trooper Tourney did not testify Route D is a highway, much less a four-lane highway -- he described it as a "back road" and did not "respond in the affirmative" when asked if it was a "blacktop highway," only responding, "Blacktop."

As for taking judicial notice, there is no evidence the court was asked to or did take judicial notice of this "fact." As the court stated in *Mince v. Mince*, 481 S.W.2d 610, 614 (Mo.App. 1972):

It does not appear that any request was made of the trial judge to take judicial notice of the records and proceedings of 1966 and March, 1970, wherein this

evidence is said to repose. Nor does it appear that the trial court did in fact take notice of these records, even in the absence of request, in the determination of the issue presented. 'The facts of which a trial court does take judicial notice must be offered in evidence so as to become a part of the record in the case.' [citations omitted].

Likewise, in this case, the State failed to request the court take judicial notice and there is no record indicating the court did take judicial notice. The "fact" (that Route D is allegedly a highway) of which the trial court did not take judicial notice was not, therefore, offered in evidence as part of the record in the case and should not be considered.

In the case cited by the State, *State v Hammons,* 964 S.W. 2d 509, 514 (Mo. App. 1998), the court took judicial notice of the official highway map of the state of Missouri in finding that a road was of sufficient width for the defendant to stay on the right half of the roadway, not to fulfill an element of the State's burden of proof, as the State argues here. *Id.*

Despite the State's protestations to the contrary, the case of *State v. Thenhaus,* 117 S.W 3d 702 (Mo. App. E.D. 2003) actually involved the precise question at issue here. Although the State attempts to distinguish the case because the road in question there was "Bowen Cemetery Road," "Route D" does not refer

to a highway, either, and even the State calls Route D a "State road." (See Respondent's Brief, p. 15).

By arguing for judicial notice of Route D as a highway, the State asks this Court to supply evidence it neglected to present at trial, which would essentially eliminate one of the elements of proof required here, contrary to Defendant's constitutional right to have the State prove its case in court on all elements and beyond a reasonable doubt. In order to convict a defendant of a criminal offense, the State is required, as a matter of due process, to prove beyond a reasonable doubt each and every element of the offense. *State v Sellmeyer,* 108 S.W. 3d 780 (Mo. App. W.D. 2003).

Finally, the State fails once again to even address several of Defendant's arguments, including: application of the *ejusdem generis* rule of statutory construction; the *Lancaster* case, where the phrase "other kind of explosives" was held to mean "high explosives," based on the language before that phrase; the rule that a "definate and specific phrase or work takes precedence over the general"; and the State's failure to provide any evidence that Route D was a "four-lane highway."

III. The Trial Court Erred In Finding Mr. Dunn Guilty And In Taking Judicial Notice Of Facts Not In Evidence, Because The State Failed To Prove That Mr. Dunn Discharged Passengers At A Location Where The Bus Was Not "Plainly Visible" For At Least Three Hundred Feet In Each Direction To Drivers Of Other Vehicles And Failed To Prove Which Distance Applied Under The Circumstances, In That No Witness Testified To The Precise Location Of The Bus When A Passenger Was Discharged, The Only Admissible Measurement Was Taken After The Accident And After The Bus Was Moved, The Measurement Was Taken To An Imprecise Location At "The Crest Of The Hill," There Was No Evidence A Driver Of A Vehicle Over the Hill Could Not Have Seen A Ten-Foot Tall Bus, The Only Testimony As To Which Distance Applied Was That There Was A 55 M.P.H. Speed Limit "In That Area" And The Trial Court Based Its Decision On "Personal Knowledge" Of The Accident Scene.

A. Standard of Review

Where a criminal defendant challenges the sufficiency of the evidence to support his or her conviction, review is limited to determining whether sufficient evidence was admitted at trial from which a reasonable trier of fact could have found each element of the offense to have been established beyond a reasonable doubt. *State v Anderson,* 108 S.W. 3d 680, 681-682 (Mo. App. W.D. 2002). The State misstates the standard of review here, simply referring to whether sufficient evidence exists from which the trial court "could have returned a guilty verdict."

B. The State fails to even respond to key facts.

Instead of actually addressing the evidence, the State again simply ignores the problems with the evidence. As for the testimony of Trooper Tourney, for example, the State fails to address the fact that Trooper Tourney admitted that he did not see any passengers discharged from the bus at the location of the bus, post-accident, where he took the measurement. Trooper Tourney's own testimony demonstrates that the bus was not at the place where Trooper Tourney measured when a passenger was discharged. Moreover, the State fails to address the fact that the measurement was not made from the perspective of a driver of a vehicle and that the measurement made was imprecise.

As for the testimony of Greg Rost, the State does not even attempt to argue

that the testimony of Greg Rost, that his daughter told him where she was discharged, was not hearsay. Therefore, his measurement has no foundation, as was the objection at trial. (Tr. 48, 50). Moreover, he did not testify that he could not see the bus from the point at which he measured, only that there was no visibility from the north side of the crest of the hill. (Tr. 51). And the State ignores the fact that Greg Rost admitted that he did not witness his daughter being discharged from the bus on the day in question. (Tr. 53).

As for the testimony of Sarah Rost, the State fails to address the fact that she did not show her father where the bus was stopped, nor did she testify to any measurement being made by her father. (Tr. 54-68). She did not testify that the bus was not visible from a vehicle less than 300 feet away, because **she never even turned around to look at the bus after she left it.** (Tr. 59-60). As for her testimony that the bus did not move after she left it, she admitted that this was based entirely upon the notion that she "would have heard the engine going and then taking off" if the bus had moved. (Tr. 61). However, testimony at trial was that the bus did not move until after Ms. Rost reached her driveway. (Tr. 26, 78-79).

The following facts, therefore, do not *disappear* simply because the State ignores them:

- Not one witness testified that the bus was not visible to a driver of a vehicle at least 300 feet away;
- There was never a precise measurement taken of where the bus was at the time Ms. Rost disembarked from the bus;
- The only admissible measurement of the location of the bus was taken after the bus moved, after the accident;
- The only admissible measurement of the location of the bus was taken to the imprecise location of the "crest of the hill."
- There was no evidence the driver of a vehicle over the hill could not have seen a ten-foot tall yellow bus;

C. The court erred in taking judicial notice of facts not in evidence.

It is interesting that in the case primarily relied upon by the State, *State v. Buckley*, 298 S.W. 777 (Mo. 1927), the court did not take judicial notice of the facts involved. As the *Buckley* court stated:

> We think the trial court could not have taken judicial notice that leaden balls are used exclusively in .22 rifles, or that a ball shot from such a rifle will make a larger hole in a man's skull than the diameter of the ball when it was fired from the gun; yet, in light of the evidence, that is precisely what both juries found by their verdicts. The juries, in rendering their verdicts, had the

right and it was their duty, to use their common sense and to take notice of things generally known by people of intelligence in the jurisdiction, and "to judge of the weight and force of the evidence by their own general knowledge of the subject of inquiry." Thus, the statements cited by the State from *Buckley* are simply dicta.

Although the State insists that this court may take judicial notice of the official highway map of the State of Missouri on this issue, cases in which Missouri courts have taken such notice have primarily involved the issue of venue, not sufficiency of the evidence. See, e.g., *State v Stiles,* 706 S.W. 2d 944 (Mo. App. W.D. 1986); *State v Harper,* 778 S.W. 2d 836 (Mo. App. S.D. 1989).

Moreover, the court here went beyond simply taking judicial notice of the official highway map of the State. As the State admits, the trial judge took "judicial notice" that there was "no visibility south of the crest of the hill." (Tr. 124-125). This goes beyond taking judicial notice of an officially recognized fact to actually "filling in" the State's failure of proof. This is constitutionally impermissible.

In order to convict a defendant of a criminal offense, the State is required, as a matter of due process, to prove beyond a reasonable doubt each and every element of the offense. *State v Sellmeyer,* 108 S.W. 3d 780 (Mo. App. W.D. 2003). In none of the cases cited by the State did the court take judicial notice of a

fact the State was required to prove, an element of the offense. For the court to take such notice would impinge on Defendant's right to due process.

Moreover, the cases cited by the State do not support its position. In *Pogue vs. Smallen*, 285 S.W. 2d 915, 917 (Mo. 1956), for example, the court held that judicial notice was not proper under the circumstances, which hardly supports the State's view here. In *State v Webber*, 814 S.W. 2d 298, 303 (Mo. App. 1991), the court simply held that it was proper to take judicial notice of a sheriff's return in a protective order case. And in *Scheuller v Continental Life Insurance*, 169 S.W. 2d 359, 365 (Mo. 1943), the Court held that judicial notice was inappropriate, because, as here, it did "not appear" that the trial court took judicial notice and the court did not have sufficient evidence before it to take judicial notice of the proposed "fact." *Id.*

Finally, the State argues that there was no objection on the record here and that the failure to object constitutes a waiver. The State, however, knows very well that the fact that the trial court took judicial notice of, that there was "no visibility south of the crest of the hill," was not mentioned by the trial court until after the trial when the trial court was pronouncing its judgment.

Basically, the State argues that any objection is waived to evidence even though it was not presented, but sua sponte judicially noticed. This is simply

ridiculous. In *Chandler vs. Hemeyer,* 49 S.W. 3d 786, 792 (Mo. App. W.D. 2001), a case cited by the State for this notion, the court held that the defendant waived any objection to taking judicial notice of the file in another criminal case. The difference between this case and *Chandler,* of course, is that: 1) the Court in *Chandler* did not take judicial notice of a fact that fulfilled an element of the State's case; 2) the court in *Chandler* did not take judicial notice of an obscure "fact" that was not officially recognized; 3) the defendant in *Chandler* actually had an opportunity to object; and 4) in the *Chandler* case, the evidence was physically before the court. *Id.* In the instant case, there was no way to suspect that the trial court would take "judicial notice" of a fact not in evidence after both parties had rested.

Other cases cited by the State also provide no assistance to its cause. In *Rice v James,* 844 S.W. 2d 64, 68 (Mo. App. E.D. 1992), the issue of "judicial notice" was not even raised, as the issue of illegality was tried by the implied consent of the parties. *Id.* And in *Harden vs. Harden,* 512 S.W. 2d 851, 854 (Mo. App. 1974), the court again took judicial notice of its own records, which was, of course, not the case here.

The State has completely failed, therefore, to demonstrate that it was proper for the court to take judicial notice of facts not in evidence, particularly a fact that it

relied upon to satisfy an element of the State's case, which the Court used, in part, to find Defendant guilty. This deprived Defendant of his right to due process.

The trial court is to make its decisions based on the evidence, not prosecute the case for the State by taking judicial notice of matters not proven by the evidence to supplement the State's lack of proof.

CONCLUSION

For all the foregoing reasons, as well as those set forth on Appellant's initial Brief, Appellant prays this Court declare the statute unconstitutional, or unconstitutional as applied, or reverse for lack of proof beyond a reasonable doubt on each element of the offense.

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I hereby certify that a true and correct copy of the above and foregoing Appellant's Brief was mailed this __th day of April, 2004, to:

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CERTIFICATION
AS TO WORD COUNT, VIRUS SCAN AND THAT DISK IS VIRUS FREE

Pursuant to Rule 84.06, Appellant hereby certifies that the word count herein, as calculated by the word count system employed, is 4294 words, and does not exceed the 7750 word limit provided by the rule. Additionally, Appellant certifies that the disk submitted to the Court has been scanned for viruses and is virus-free.

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